IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 217 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? No

J

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

ADITYARAM JAGJIVANDAS PANDYA

Versus

THAKKAR DHIRAJLAL MANILAL

Appearance:

MS JAYSHREE C BHATT for Petitioner

MR KD VASAVADA for Respondent No. 1

MR SURESH M SHAH for Respondent No. 2

RULE SERVED for Respondent No. 4

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 25/06/98

ORAL JUDGEMENT

1. The original defendant No.2 has filed this Revision under Section 29(2) of the Bombay Rent Act, 1947

(for short "The Act").

2. Brief facts are that the respondents No.1 to 3 said to be landlords, filed Suit for eviction of respondent No.4 - tenant in chief on three grounds. The first was that the respondent No.4 was in arrears of rent since 11.12.1981 which exceeded six months and the same was not paid despite service of notice of demand. The second was that the premises was required bonafide for the personal use of the landlords. The third was that the respondent No.4 had sub-let the accommodation to the revisionist. Consequently the decree for eviction, arrears of rent and mesne profit was prayed for. The tenant in chief - defendant No.1, who is respondent No.4, in this revision did not appear to file any written statement nor did he enter the witness box.

3. The Suit was resisted by the revisionist - defendant No.2. His stand was that originally Prabhudas Kanjibhai was landlord and that the plaintiffs are subsequent purchasers from the original landlord. The defendant No.1, viz. respondent No.4 of this revision, was simply rent collector on behalf of original landlord and that the revisionist was tenant of the defendant No.1 and that he was not tenant of Prabhudas Kanjibhai nor he is sub-tenant of defendant No.1.

4. The Suit was tried by the trial Court. It was ultimately dismissed. An Appeal was preferred. The Appellate Court found that the theory of payment of rent was not established and that it was proved that the revisionist was sub-tenant of respondent No.4. Accordingly the Judgment and Decree of the trial Court was set aside and the Suit was decreed for eviction and recovery of arrears of rent, etc. It is, therefore, this Revision.

5. Learned Counsel for the revisionist has rightly contended that the lower Appellate Court has not properly appreciated the legal position and has delivered Judgment on mere surmises and conjectures. The entire evidence was also not considered by the lower Appellate Court and wrong onus of proof was laid by the appellate Court on the shoulders of the revisionist. Learned Counsel for the respondents landlords, on the other hand, contended that there is admission of the defendant No.2 that he is sub-tenant of defendant No.1. Hence, Decree for eviction was rightly passed. He took me through the findings of the lower Appellate Court on Point No.2.

6. In my opinion the Judgment of the lower Appellate

Court proceeds under confusion and misappreciation of law and facts. The basic principle is that it is for the plaintiffs landlords to establish that the defendant No.1 was their tenant. It is again for the landlord to establish that the tenant in chief viz. defendant No.1 had sub-let the accommodation to defendant No.2 and it is only after such findings and recording further finding regarding non-payment of arrears of rent that the Suit could be decreed. No doubt the defendant No.2 took a case that he is tenant of the defendant No.1 and not his sub-tenant. Yet on the facts and circumstances of the case the onus to establish sub-letting could not be shifted upon the sub-tenant nor the onus of proof that the defendant No.2 is direct tenant of defendant No.1 could be shifted on him. Even if the defendant No.1 failed in establishing that he is tenant of defendant No.1 the suit could not have been decreed against him.

7. It is not a case of concurrent finding of fact. I am therefore unable to agree with the learned Counsel for the respondents that the revisional interference in this revision is not required. Since it is a case of non-concurrent finding regarding relationship of landlord and tenant and also on the point of sub-tenancy the revisional court can appreciate the evidence, of course, limitation is that it can not substitute its own finding. If the revisional court comes to the conclusion that the findings recorded by the lower Appellate Court are contrary to law and/or by misreading of evidence or non-consideration of evidence the matter can be remanded to the lower Appellate Court for fresh disposal of Appeal in accordance with law.

8. It is not a case where definite finding could be recorded by the lower Appellate Court that the defendnt No.1 is in collusion with the landlords as well as with the revisionist. In the absence of cogent material for recording such findings the lower Appellate Court committed menifest error of law in holding that the defendant No.1 is in collusion with the landlords and the revisionist.

9. The Lower Appellate Court was further in error in observing that the defendant No.1 should have been examined by the defendant No.2, viz. the revisionist. Adverse inference was drawn against the revisionist on two grounds. Firstly for his falure to examine the original landlord and secondly the defendant No.1. No such adverse inference could legally be drawn by the lower Appellate Court. After all the lower Appellate Court should have first on the basis of evidence on

record given finding that the plaintiffs have proved that the defendant No.1 viz. the respondent No.4 of this revision was their tenant. On this point there is no clear finding and mixed as well as confused finding has been recorded by the lower Appellate Court while deciding point No.2 in its Judgment. Unless there is clear finding that the defendant No.1 is tenant of the respondents No.1 to 3 even on the admission of the defendant No.2 that he paid rent to the defendant No.1 the plea of sub-letting could not be accepted by the lower Appellate Court. Irrelevant and insignificant factors were taken into consideration for coming to confused conclusion that the defendant No.1 was impliedly tenant of the plaintiffs. Such confused Judgment can not be sustained in the eye of law. It is not within the province and scope of jurisdiction of the revisional court to reappraise the evidence and record a categorical finding, especially when the finding of the trial Court and that of the Appellate Court, are not concurrent. It is therefore a fit case where the revision should be allowed and after setting aside the Judgment and Decree of the Lower Appellate Court the case should be remanded to the lower Appellate Court for fresh determination on the following points :

1. Whether the defendant No.1 is tenant of the plaintiffs - respondents No.1 to 3;

2. Whether the defendant No.1 can be evicted on grounds contemplated under Section 12(3)(a) of the Act;

3. Whether the defendant No.2 is sub-tenant of the defendant No.1.

10. It is only after recording categorical findings on these points after hearing the arguments of the two sides that fresh judgment shall be delivered by the lower Appellate Court in accordance with law. It is, however, clarified that the parties shall not be permitted to adduce any oral or documentary evidence after remand and the Lower Appellate Court shall consider only the evidence which is already on record. In the circumstances of the case the parties shall bear their own costs. Rule made absolute only in the aforesaid terms.

* * * * * sd/-

sas